

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MICHAEL D. KOOP**

Claimant

VS.

**BLUEVILLE NURSERY, INC.**

Respondent

AND

**NATIONWIDE MUTUAL INS. CO.**

Insurance Carrier

Docket No. 1,062,755

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the November 1, 2012, Preliminary Hearing Order entered by Administrative Law Judge Rebecca A. Sanders. John M. Ostrowski, of Topeka, Kansas, appeared for claimant. David J. Bogdan, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found claimant's need for psychological treatment did not arise out of and in the course of his employment. Instead, the ALJ found claimant's work accident exacerbated or aggravated his preexisting psychological condition. Claimant's request for medical treatment of his psychological injury was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 31, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Claimant asserts his depression, for which he is seeking psychological treatment, was not a preexisting condition. Claimant also argues because he suffered a compensable injury, respondent is obligated to provide medical care to cure and relieve the effects of his injury. Claimant contends K.S.A. 2011 Supp. 44-510h does not require him to prove a prevailing factor in order to obtain treatment. Next, claimant argues the ALJ rejected uncontradicted evidence that the prevailing factor in his need for psychological treatment

was the work-related injury. Last, in the event the Board finds claimant's depression to be a preexisting condition, the same was not solely aggravated or exacerbated by the work-related accident.

Respondent asks that the Board affirm the Preliminary Hearing Order of the ALJ.

The issues for the Board's review are:

(1) Did claimant's need for psychological treatment arise out of and in the course of his employment? Is respondent obligated to provide medical care to cure and relieve the psychological effects of his injury?

(2) Is claimant's depression a preexisting condition? If so, was his depression solely aggravated or exacerbated by the work-related accident?

(3) Is claimant required to prove a prevailing factor in order to obtain treatment for his psychological condition? If so, has this been proven?

#### **FINDINGS OF FACT**

Claimant has been employed by respondent for two or three years, performing landscaping work. On October 26, 2011, claimant injured his right shoulder while removing a stump from a backyard. After physical therapy and testing, claimant eventually underwent surgery on his right shoulder performed by Dr. Bryce Palmgren. After the surgery, in August 2012, claimant underwent another surgery in which his shoulder was manipulated because of build up of scar tissue. Claimant continues to be under Dr. Palmgren's care. Claimant has pain in his right shoulder down his right arm. He has pain and numbness in his neck and has started getting headaches. Claimant is still off work from his injuries.

Prior to his injury of October 26, 2011, claimant had been treated for acute anxiety disorder. Claimant's primary care physician, Dr. Kiracofe, had prescribed Xanax for claimant's anxiety attacks. On three occasions, claimant had gone to the emergency room thinking he was having a heart attack and was subsequently diagnosed with anxiety. All those episodes occurred during times he was working.

Claimant's first anxiety episode occurred in the spring on a rainy day. He was working and then felt an overbearing sense of doom followed by stereotypical heart attack symptoms. Claimant said he did not feel any depression at the time. Claimant's second anxiety episode was much the same as the first, but he was able to recognize the symptoms earlier. When claimant experienced the third episode, he recognized the feeling when it came on and called the hospital ahead of time. When he went to the hospital the third time, he was treated for anxiety without having any testing for his heart. He was given Xanax right away, and the medication helped. Dr. Kiracofe began prescribing Xanax for

claimant to be taken as needed, and all his future panic attacks were controlled by his medication. He had been on Xanax for about a year before his accident.

Claimant had never been treated for depression before the October 2011 accident. He had never undergone psychological counseling. Claimant said his depression symptoms are not at all similar to those he experiences with his anxiety disorder. His anxiety disorder causes him to experience symptoms similar to those as if he were having a heart attack. His depression causes him to sleep more. Claimant said other people started telling him he was depressed. One night he was thinking he would not be able to go back to his landscaping work and it came down to either calling and getting some psychiatric treatment or committing suicide.

Claimant first sought psychological help, he thinks, in July 2012. He began seeing a psychiatrist, Dr. Jerkovich. Dr. Jerkovich prescribed a higher dose of Xanax and also prescribed Seroquel and Celexa. Claimant had been taking .5 to 1 milligram of Xanax per day whenever he needed it before his accident. Currently, claimant is taking 4 milligrams of Xanax every day. Claimant is also on an antidepressant, Paxil, which replaced the Celexa that Dr. Jerkovich originally prescribed. He is also on Seroquel, an antipsychotic, which he takes for sleep. Claimant had never been on antidepressant or antipsychotic medication before the accident.

Dr. Jerkovich referred claimant to Linda Simpson, a Licensed Clinical Professional Counselor (LCPC), and claimant has been seeing her every two weeks. Claimant said Ms. Simpson tries to keep him positive. She is pushing him to think about other careers in case he cannot go back to landscaping and has suggested he do some volunteer work.

Claimant said he has gone online to see what other work he could do or if he could get an associates degree to get into a fall-back career. He has not followed up with anything he found online. Ms. Simpson told him her husband works for K-State and runs an aptitude test to try to place workers; however claimant has not contacted Ms. Simpson's husband. Claimant has done nothing in the way of doing any volunteer work.

Ms. Simpson's treatment records corroborate claimant's description of his sessions with her. She has diagnosed claimant with moderate recurrent major depression and panic disorder without agoraphobia. In answer to a letter sent to her by claimant's attorney, Ms. Simpson opined that the prevailing factor in claimant's need for ongoing psychological treatment is his work-related shoulder and neck injury.

#### **PRINCIPLES OF LAW**

K.S.A. 2011 Supp. 44-508 states in part:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or

injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2011 Supp. 44-510h(a) states:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

The Kansas Supreme Court has long held that traumatic neurosis, as well as other psychiatric problems are compensable. "[W]e have held that traumatic neurosis *following physical injury*, and shown to be directly traceable to such injury, is compensable under the act."<sup>1</sup> However, the court in *Berger*<sup>2</sup> cautioned:

Even though this court has long held that traumatic neurosis is compensable; we are fully aware that great care should be exercised in granting an award for such injury owing to the nebulous characteristics of a neurosis. An employee who predicates a claim for temporary or permanent disability upon neurosis induced by trauma, either scheduled or otherwise, bears the burden of proving by a preponderance of the evidence that the neurosis exists and that it was caused by an accident arising out of and during the course of his employment.

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<sup>1</sup> *Jacobs v. Goodyear Tire & Rubber Co.*, 196 Kan. 613, 616, 412 P.2d 986 (1966).

<sup>2</sup> *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 550, 506 P.2d 1175 (1973).

In *Love*,<sup>3</sup> the Kansas Court of Appeals stated:

In order to establish a compensable claim for traumatic neurosis under the Kansas Workers' Compensation Act, K.S.A. 44-501 *et seq.*, the claimant must establish: (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and (c) that the neurosis is directly traceable to the physical injury.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>5</sup>

### ANALYSIS

Claimant sustained a work-related right shoulder injury on October 26, 2011. Conservative treatment was not successful. Claimant underwent two surgeries, the second in August 2012, almost 10 months after the initial injury. Even after this second surgical procedure, claimant's symptoms remain. Claimant continues under medical care and has been unable to return to work. This injury, prolonged treatment, pain and inability to return to work has resulted in depression. Claimant has a preexisting history of an anxiety disorder but not with depression. Claimant's depression condition is not solely an aggravation or exacerbation of a preexisting condition. Claimant's current treating counselor, Ms. Simpson, has opined that claimant's work-related shoulder injury is the prevailing factor in claimant's developing depression and in his need for psychological treatment. There is no contrary expert psychological or psychiatric opinion.

### CONCLUSION

(1) Claimant's need for psychological treatment for depression is directly attributable to the October 26, 2011, shoulder injury, which arose out of and in the course of his employment with respondent.

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<sup>3</sup> *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl., 771 P.2d 557, *rev. denied* 245 Kan. 784 (1989).

<sup>4</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

<sup>5</sup> K.S.A. 2011 Supp. 44-555c(k).

(2) Claimant's current psychological condition of depression did not preexist his work-related accident. As such, it was not solely aggravated or exacerbated by the work-related accident.

(3) Claimant's work-related accident and injury is the prevailing factor in causing his current need for treatment.

**ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated November 1, 2012, is reversed. Respondent is obligated to provide medical care and treatment to cure and relieve the effects of claimant's injury, including the resulting psychiatric/psychological condition.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2012.

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HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

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Rebecca A. Sanders, Administrative Law Judge